

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of the Commission's)	CC Docket No. 94-102
Rules to Ensure Compatibility)	
with Enhanced 911 Emergency)	
Calling Systems)	
)	

**REPLY COMMENTS OF
NEXTEL COMMUNICATIONS, INC.
AND NEXTEL PARTNERS, INC.**

Nextel Communications, Inc. and Nextel Partners, Inc. (collectively "Nextel"),¹ by its attorneys and pursuant to the Federal Communications Commission's ("Commission" or "FCC") Public Notice,² hereby reply to the comments and oppositions filed to Nextel's Petition for Clarification and Partial Reconsideration ("Petition"). Nextel petitioned the Commission asking that it better explain or clarify portions of its *Order* granting Nextel a temporary conditional waiver of the Enhanced 911 ("E911") Phase II automatic location rules.³

Nextel specifically challenged as arbitrary and capricious certain aspects of the *Order* that deviated from even-handed treatment of all Commercial Mobile Radio Service ("CMRS") providers, each of whom has the exact same Phase II compliance responsibilities and virtually all of whom had Phase II waivers pending. The Commission created a "two-track" process for evaluating waivers filed by "national" carriers versus "mid-sized or small" CMRS carriers.

¹ Nextel Partners, Inc. is an affiliate of Nextel Communications, Inc. and is constructing and operating iDEN wireless communications systems in numerous rural and suburban markets in the United States under the Nextel brand.

² Cingular, Nextel, and Verizon File Petitions for Reconsideration of Commission Orders on Wireless E911 Phase II Waiver Requests, *Public Notice*, (rel. Nov. 20, 2001).

³ In the Matter of Revision of the Commission's Rules To Ensure Compatibility with

This was done utterly without explanation and without appropriate public notice and opportunity for comment. The Commission's silence on the issue of why it chose to deal with only several waivers of "national" carriers while at the same time allowing all others another bite at the apple, suggests that the Commission has no reasonable explanation for its decision.

Another significant problem with the *Order* was the Commission's statement that any future lack of available Phase II compliant equipment would not excuse Nextel for its noncompliance with the deployment schedule approved in the *Order*.⁴ By this statement the Commission effectively prejudged any future waiver request Nextel might be forced to make, thereby unreasonably modifying the future waiver standard to be applied to Nextel.

Tellingly, both of the parties opposing Nextel's Petition and virtually all the commenters agree that the Commission did, in fact, announce a new Phase II waiver standard applicable to Nextel and several other national carriers. The Public Safety Organizations⁵ argue that this new standard is appropriate due to "changed circumstances." They are operating in a vacuum, however, in attempting to justify the Commission's change in the standard because – just as the Commission did in spontaneously creating a two-track review process for waivers – the Commission has failed to articulate any explanation for its apparent decision to modify the general waiver standard to be applied to any future waivers Nextel may have to file.

Enhanced 911 Emergency Calling Systems, Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc., CC Docket No. 94-102, FCC 01-295 (rel. Oct. 12, 2001) ("*Order*").

⁴ *Order* at ¶36.

⁵ The term "Public Safety Organizations" refers to Joint Opposition of The National Emergency Number Association, the Association of Public-Safety Communications Officials-International, the National Association of State Nine One One Administrators and the one page joinder filing by Tarrant County, Texas 9-1-1 District.

I. THE COMMISSION IMPROPERLY SUBJECTED NEXTEL TO DISPARATE TREATMENT.

All CMRS carriers have the same duty to deploy Phase II or file timely waiver requests setting forth their case for relief from the rules. As reflected in the record, Nextel performed a range of tests on possible Phase II location technologies, selected the one it believed best met the Commission's requirements, and filed a waiver request on November 9, 2000 – approximately 11 months prior to the October 1, 2001 initial compliance deadline. The Commission, without any explanation, chose to address the pending waivers of four other “national” carriers while at the same time ignoring the many pending waivers filed by “small and mid-sized” carriers, and in fact, giving those “small and mid-sized” carriers additional time to file or supplement waiver requests.

By giving the members of the second group additional time to file or update their waivers, the Commission effectively created two tracks of CMRS carriers for purposes of assessing Phase II compliance.⁶ The previous policy of treating carriers uniformly should not be compromised and certainly cannot be without a reasoned explanation. Because the record is lacking entirely in any explanation of the reasons for disparate treatment, it cannot be sustained on reconsideration.

It appears that the Commission may have had a difficult time reaching consensus on any Phase II waiver request. That, however, in and of itself does not permit the Commission to act on only five of the pending waivers while deferring action on all others.⁷ The challenges of the Commission's internal processes can provide no justification for imposing increased oversight

⁶ Wireless Telecommunications Bureau Provides Guidance on Filings by Small and Mid-Sized Carriers Seeking Relief from Wireless E911 Phase II Automatic Location Identification Rules, *Public Notice*, (rel. October 19, 2001).

⁷ As of October 1, 2001, the Commission had pending Petitions for Reconsideration of the VoiceStream Waiver Order and approximately 70 pending petitions for waiver of other CMRS carriers. All these waiver requests remain outstanding.

and reporting requirements on Nextel and only a few other carriers, or for effectively allowing the large majority of CMRS providers more time to reflect on, and alter, their Phase II implementation plans.

While the Public Safety Organizations argue that the Commission did not give small or mid-sized CMRS carriers more time to implement Phase II, their position is plainly contradicted by the Commission's decision to allow small and mid-sized carriers to file initial waivers or revised waivers by November 30, 2001, a full month and a half after the Commission disposed of the "national" carrier waivers, and nearly two months after the October 1 deadline in the rules. As of October 12, the Commission committed Nextel to a firm schedule for its Phase II deployment. In contrast, other carriers with pending waivers and even carriers that had filed no waiver had an opportunity to pause, reflect and perhaps reformulate their plans based upon the Commission's actions on the "national" carrier waivers. This is not even-handed, uniform application of the rules and the Commission must, at the very least, justify choosing a two-track approach not contemplated by its rules that permits some carriers to continue to revise their implementation choices, while others cannot.

II. THE COMMISSION CANNOT IMPOSE A NEW STRICT LIABILITY WAIVER STANDARD FOR PHASE II COMPLIANCE.

Just as important as the unexplained disparate treatment of carriers was the Commission's announcement in the *Order* that it intends to apply a strict liability waiver standard to Nextel in evaluating its future Phase II compliance. Specifically, in approving Nextel's compliance plan, the Commission stated that if Nextel did not provide Phase II compliant service by the dates specified by the Commission, Nextel would be deemed "noncompliant."⁸ The Commission further observed that any assertion that an equipment

⁸ See *Order*, ¶ 36.

manufacturer is unable to supply Phase II compliant equipment will not excuse noncompliance.⁹ By these statements, the Commission appears to have introduced a new strict liability standard into evaluation of any future waivers by Nextel and the other national carriers.

To be sure, there is legitimate confusion as to whether the Commission actually intended to alter its waiver standard. Sprint PCS, for example, argues that the Commission could not have changed its waiver standard, pointing out that none of the “national” carrier waiver orders either discussed any reasons for departing from past precedent regarding the governing standard for waivers, or cited any precedent that would support applying a new standard. Sprint PCS reads these omissions as evidence that the Commission did not intend to adopt an entirely new waiver standard.¹⁰ Sprint PCS also questions whether, where a carrier has used its best efforts to implement Phase II in accordance with a revised schedule, the Commission has sufficient authority to apply a strict liability approach to judge future events.¹¹

In contrast, the Public Safety Organizations approve tougher enforcement in Phase II compliance matters.¹² They read the strict liability language as the Commission’s response to “the seemingly endless stream of extensions of time and waiver requests” filed by wireless carriers.¹³ However, this is nowhere explained in the *Order* and, even if it had been explained, would not justify ignoring the facts and circumstances that exist at the time any possible future

⁹ *Id.*

¹⁰ Sprint PCS Comments at 4.

¹¹ *Id.* at 3. Sprint PCS points out that Section 503 of the Communications Act only authorizes sanctions if the carrier’s action is willful. Sprint PCS argues that noncompliance due to circumstances beyond a carrier’s control is plainly not “willful.”

¹² Public Safety Organizations Opposition to Nextel Communications, Inc.’s Petition for Clarification and Partial Reconsideration at 4.

¹³ *Id.* at 7. Nextel understands the impatience of the Public Safety community but notes that the “endless stream” of waivers are not typically waiver upon waiver filed by individual carriers, but numerous individual waivers filed by the many CMRS carriers licensed throughout the United States. The fact the Commission has so many waivers to process is entirely due to the

waiver requests are filed. The mere fact that different parties can look at the same language in the *Order* and reach opposite conclusions about its import evidences that that the Commission failed to explain its intentions.

As the equipment manufacturers and many CMRS carriers observe, carriers cannot and should not be held accountable for the failure of equipment suppliers to timely deliver Phase II compliant equipment.¹⁴ While the Public Safety Organizations note that the inability to obtain Phase II compliant equipment may be considered as a possible mitigating factor in a carrier's failure to comply, there is little doubt in the Public Safety Organizations' filings that they support findings of a rule or waiver violation, even for circumstances beyond a carrier's control.¹⁵

It is obvious that the Commission has created new confusion regarding its intentions. For example, it is not at all plain what a carrier must do to demonstrate its best efforts to comply or whether there is no effort on the planet sufficient for a carrier to escape liability if a manufacturer fails to produce compliant equipment on a timely basis. A strict liability standard to all future Phase II waivers, however, cannot be justified. A strict liability standard by which Nextel would automatically be subject to an enforcement action if it does not meet the requirements of the *Order*, including situations where non-compliance is beyond Nextel's control,¹⁶ is unreasonable and contradicts the Communications Act and the Commission's own

Commission's choice not to modify the deployment timetables reflected in its rules once it was obvious they could not realistically be met.

¹⁴ See, e.g., Joint Motorola/Nokia Comments at 3; CTIA Comments at 3; Copper Valley Wireless, Inc. and Southern Illinois RSA Partnership d/b/a First Cellular of Southern Illinois Comments at 3; Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies Comments at 2; Cellular Mobile Systems of St. Cloud, LLC, Wireless Communications Venture, and South No. 5 RSA LP d/b/a Brazos Cellular Communications, LLC Comments at 4.

¹⁵ Public Safety Organizations Opposition at 7.

¹⁶ See *Order*, ¶ 36.

rules.¹⁷ The Commission repeatedly has found that to impose a forfeiture penalty based on an apparent rule violation, it must first issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹⁸ The Commission and the courts have upheld a carrier's right to present evidence that would overcome the Commission's claims in support of any apparent liability.¹⁹

The introduction of a strict liability standard could extinguish Nextel's right to present evidence of vendors' inability timely to supply compliant equipment. For example, the Commission notes that a carrier's "concrete and timely" actions taken with a vendor, manufacturer, or other entity may be considered as possible mitigating factors in an enforcement

¹⁷ See 47 U.S.C. §503(b)(4)(stating that "no forfeiture penalty shall be imposed under this subsection against any person unless and until . . . the Commission issues a notice of apparent liability, in writing, with respect to such person; such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed"); 47 C.F.R. §1.80(f)(3)(stating that "[t]he respondent [to a notice of apparent liability] will be afforded a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent.")

¹⁸ Upon the issuance of a notice of apparent liability, the Commission has reiterated that, as part of the process dictated by its rules, a potentially liable carrier has the opportunity to refute claims made against it before a decision is rendered on a potential rule or statutory violation. See, e.g., SBC Communications, Inc.; Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, DA 01-2549, 2001 FCC Lexis 5955, ¶7 (rel. Nov. 2, 2001); America's Tele-Network Corp.; Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture and Order*, 16 FCC Rcd 5788, ¶22 (2001).

¹⁹ See Brittan Communications International, Corp.; Apparent Liability for Forfeiture, *Order of Forfeiture*, 15 FCC Rcd 4852, ¶6 (2000)(stating that "the carrier may [then] present evidence either to mitigate its liability or to overcome the claims raised in the [notice of apparent liability]"); *Rocky Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1122 (10th Cir. 1998)(stating that after receipt of a notice of apparent liability, "[t]he suspected violator may either pay the penalty or respond in writing to show why a lesser penalty, or none at all, should be imposed" (emphasis added)).

proceeding.²⁰ In that same paragraph, however, the Commission precludes carrier introduction of evidence of a vendor's inability to supply compliant equipment, which indicates that the Commission does not intend to consider Nextel's arguments in determining whether Nextel has violated Commission rules or the terms of its waiver.²¹ The Commission not only must consider mitigating factors, but also arguments against the imposition of any liability at all. Consequently, *a priori* foreclosure of Nextel's ability to present evidence regarding vendors' nonperformance would violate the Communications Act, the Commission's rules and precedent. The Commission must clarify its intention on reconsideration.

III. APPLYING STRICT LIABILITY WOULD IMPEDE PHASE II DEPLOYMENT.

Nextel takes its responsibility to provide E911 Phase II service very seriously as is demonstrated by its timely prosecution of a Phase II waiver and its actions to promote the earliest possible availability of Phase II services. It is unreasonable, however, for the Commission or public safety entities to attempt to have Nextel be the guarantor of another party's performance. As frustrating as the Phase II deployment process has been, the challenges that carriers face in implementing Phase II service are the inevitable outcome of the Commission's setting of unrealistic deadlines for the deployment of technology that was not in existence.²²

Browbeating carriers and threatening strict sanctions will not make the prospects for future compliance any more certain. Such an approach will only pit carrier against supplier. Nextel fears that this could well foster a dynamic where each party documents all

²⁰ See *Order*, ¶36.

²¹ *Id.*

²² See, e.g., Reply Comments of Nokia Inc. and Motorola, Inc., *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petition for Reconsideration of Nokia Inc. and Motorola, Inc.* (March 3, 2000) (stating that the Commission established impractical timing and volume requirements that could not be met by any manufacturer of wireless equipment).

communications with the other in anticipation of having to prove best efforts or some other acceptable form of diligence to the Commission in the event that a future deadline cannot be met. Creating such an adversarial environment cannot help but have a detrimental impact on the cooperation necessary between carriers and equipment suppliers to achieve timely Phase II deployment. The Commission must, therefore, reconsider or clarify what it means to do in scenarios where additional waiver relief is necessary due to circumstances beyond a carrier's control.

IV. CONCLUSION.

The Commission inaccurately forecasted the challenges that all wireless carriers face in implementing Phase II service. The way to correct that error is not to impose more onerous requirements on national carriers than on other carriers and subject them to strict liability if they fail to meet deadlines through no fault of their own. Instead, the Commission should, on reconsideration, clarify that it did not intend to alter the standards it will apply if national

carriers can demonstrate that they need further relief. The Commission must also provide some reasoned explanation of its choice to create two tracks for assessing CMRS carrier Phase II compliance waivers.

Respectfully submitted,

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January 4, 2002

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, hereby certify that a true and correct copy of the foregoing “**REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC. AND NEXTEL PARTNERS, INC.**” was sent on this 4th day of January, 2002, via first-class United States mail, postage prepaid, to the following:

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